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No. 99-1078

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

PEGGY KERNAN, *Petitioner*,

v.

BOBBY HENRY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to paragraph 6 of Rule 14 of the Rules of the Supreme Court of the United States, petitioner hereby replies to the Opposition to Petition for Writ of Certiorari in order to correct a misrepresentation of the record which is contained in that Opposition.

In footnote 3 at page 5 of the Opposition, respondent refers to a "sworn declaration [by Mr. Henry, the respondent] which the Magistrate Judge expanded the record to include." Respondent represents that in this declaration, he described the physical actions of the interrogating officers which are not evident on the tape recording or transcript, and their effect upon his state of mind. He also claims that the declaration includes a description of his military experience and that his training included the importance of appeasing his captors rather than withholding information in the event he was captured by the enemy.

It is correct that, over petitioner's objection, the Magistrate Judge initially ordered this declaration to be included in the record. However, in an order filed November 7, 1996, United States District Judge David F. Levi granted petitioner's motion for reconsideration and ordered the declaration stricken. In relevant part, Judge Levy said:

> Absent compliance with the standards of 28 U.S.C. § 2254 (e) (2), petitioner may not decline to offer testimony at a state court suppression hearing, and then seek to offer that testimony in a habeas corpus proceeding by way of a declaration that is not even subject to cross examination. Although the magistrate judge may later determine that the declaration or testimony should be received under applicable standards for the receipt of new evidence, absent a showing of cause and prejudice or compliance with § 2254 (e) (2), the declaration may not be received under Rule 7.

The magistrate judge never subsequently allowed either the declaration or testimony. Therefore, contrary to the representation in footnote 3 in the Opposition to Petition for Writ of Certiorari, the declaration was not properly before the District Court and was not part of the record considered by the United States Court of Appeal for the Ninth Circuit.

Respondent contends that the Ninth Circuit's decision is nothing more than an application of the well known rule that involuntary statements taken in violation of Miranda are inadmissible for any purpose. It is true that the Ninth Circuit held that petitioner's statements were involuntary. However, a careful reading of the

decision shows clearly that the court found petitioner's *first statement involuntary solely* because officers knowingly violated Miranda when they continued their questioning after respondent requested counsel. That is the new rule which violates *Teague v. Lane*, 489 U.S. 288 (1989) and which, in effect, overrides *Harris v. New York*, 401 U.S. 222 (1971) and it progeny.

Petitioner disagrees with respondent's reading of the Ninth Circuit's decision as holding that

> from the first time Mr. Henry unequivocally invoked his right to counsel only to have it ignored and the interrogation continue, the inherently coercive conditions of custodian interrogation combined with the officers' deliberate misconduct and Mr. Henry's own vulnerabilities to overcome his will.

Opposition at p. 3. This Court will decide whether that is a fair reading of the decision or a proper application of the standards for determining voluntariness. However, petitioner strongly objects to counsel's reference to Mr. Henry's declaration as if it supports a finding that Mr. Henry was particularly vulnerable to the inherent stress of

police interrogation. The reference to a declaration that was ordered stricken from the record is nothing less than an attempt by counsel to mislead the court.

Dated: January 31, 2000.

Respectfully submitted,

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